No. 86-324

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ARTHUR AMADOR,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

When a Court of Appeals adopts a factual finding made by the administrative agency which has been challenged as not being supported by substantial evidence, must the court reveal whether it believes the finding to have been supported by substantial evidence or to be immune from challenge under that test?

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No.

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DEPARTMENT OF TRANSPORTATION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner Arthur Amador respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 17, 1986.

OPINION BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The decision of the Merit

Systems Protection Board, from which review by the Court of Appeals was sought, is unreported and appears as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 17, 1986. A timely petition for rehearing was denied on May 29, 1986, and this petition for certiorari was filed within 90 days of that date. This court is given jurisdiction to review the judgment of the Court of Appeals by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 7701

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative.
>
> Appeals shall be processed in accordance with regulations prescribed by the Board.
>
> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other

employee of the Board designed by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(a) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(b) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

5 U.S.C. § 7703

(a)(1) An employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

* * *

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

* * *

(c) In any case filed in the United States Court for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (2) obtained without procedures required by law, rule, or regulations having been followed; or
>
> (3) unsupported by substantial evidence; . . .

STATEMENT OF THE CASE

Mr. Amador was discharged by the Department of Transportation for participating in a strike and for being absent without leave. The Merit Systems Protection Board ("MSPB" or "board"), through a decision issued by its employee who had presided over Mr. Amador's hearing, found that he had engaged in a strike and had been absent without leave on August 3 and August 6, 1981, and upheld the discharge. That finding was affirmed by the Court of Appeals, which has jurisdiction under 5 U.S.C. § 7703 to review MSPB decisions.

The Strike and the Amnesty

A strike of air traffic controllers began at 7:00 a.m. Eastern Daylight time on August 3, 1981 (App. 9). Four hours later President Reagan announced that no one would be discharged for being on strike that day or for the subsequent 48 hours, as long as he or she did then report to work (App. 10). The deadline for each controller was his or her first regularly-scheduled shift after the expiration of 48 hours from the time of the president's announcement:

> Because of differences in shift schedules and time zones, the agency allowed controllers to return to work at the time of regularly-scheduled shifts that began after 11:00 a.m., on August 5, 1981.

Adams v. Dept. of Transportation, 735 F. 2d 488, 490 (Fed. Cir. 1984).

In this case, "The 7:00 p.m. shift on August 6, was appellant's amnesty deadline shift." (App. 97)

Consequence of Agency Belief that a Controller Missed His Deadline.

Once the agency officials determined that an employee had missed his deadline shift, they refused to allow him to report to any subsequent shift:

> [A]ppellants would not have been allowed to report to work after missing their deadline shifts.

(App. 34).

There were cases in which the agency erroneously determined that an employee had missed his deadline shift, usually because the agency had failed to note that the employee had been on leave or on his regular day off. When it discovered its error, the agency would rescind its original discharge notice (which had charged a failure to report to an erroneously designated deadline shift), but then would issue a new discharge notice charging that the employee had failed to report to his actual deadline shift. In those cases, the MSPB systematically reversed the discharges, holding that it was unfair to discharge an employee for failing to report to a shift which the agency had decided he would not be allowed to report to. *Johnson v. Dept. of Transportation,* 17 M.S.P.R. 387 (1983), *Bangerter v. Dept. of Transportation,* 16 M.S.P.R. 670, 699 (1983), *Adler v. Dept. of Transportation,* 18 M.S.P.R. 277, 179 (1983), *Andrews v. Dept. of Transportation,* 18 M.S.P.R. 364, 368 (1983), and *Edwards v. Dept. of Transportation,* 17 M.S.P.R. 405 (1983).

August 5 Discharge Notice

It is undisputed that on August 5 the agency sent Mr. Amador

two copies of a letter, one by certified mail and the other by first class mail, proposing to discharge him for striking, and charging specifically that he had wrongfully refused to report to a shift at 2:00 p.m. August 5 (Jt.App. 69).[1] The August 5 discharge notice was not rescinded until August 11, when it was replaced by a notice lacking the charge that Mr. Amador had wrongfully refused to report to a shift on August 5 (Jt.App. 71).

Claimed Reliance on the August 5 Discharge Notice.

Mr. Amador testified at the MSPB hearing that he did not report to his scheduled shift on August 6 because he had that day received the regular mail copy of the August 5 proposal to discharge him:

> QUESTION: Art, why didn't you go to work on August 6th?
>
> MR. AMADOR: I did not go to work because I received a notice of proposed termination—
>
> QUESTION: Okay.
>
> MR. AMADOR: —prior to the scheduled work shift.
>
> QUESTION: Okay. Was that the proposed notice in there dated August 5th.
>
> MR. AMADOR: Yes, it was.

(Jt.App. 102).

---

1. "Jt.App." refers to the Joint Appendix filed by the parties in the Court of Appeals.

Decision of the Merit Systems Board

The MSPB found that at his hearing Mr. Amador actually admitted to being on strike on August 6; not surprisingly, the MSPB relied on this perceived admission as proof of his guilt:

> In response to the evidence presented by the agency, *the appellant admitted that he was absent from work on August 3 and 6,* two days that he was scheduled to work. Additionally, *appellant admitted that he did not work on those dates because he was participating in a "job action" against his employer.*
>
> * * *
>
> After reviewing the evidence presented, I find that appellant has not rebutted the agency's *prima facie* case that he voluntarily participated in the strike on August 3 and 6.
>
> In reaching this decision, I am persuaded by and have relied on the following evidence: (1) the fact that appellant was scheduled for and absent from duty on August 3 and 6; (2) the fact that the above absences occurred during a period which I have found that the strike was in progress; (3) the fact that after approximately 18 months, appellant has failed to offer any excuse or explanation for his absences; and (4) appellant's admission that he participated in the "job action" which I have found was an illegal strike.

(App. 98-100). (Emphasis added.)

Having found that Mr. Amador had admitted being on strike on August 6, the board did not mention his testimony that his absence that day was actually due to his receipt of the August 5 discharge notice.

Parties' Arguments in the Court of Appeals

Mr. Amador argued to the Court of Appeals that since the hearing transcript did not contain an admission by him that he had been on strike on August 6, the board's finding was unsupported by substantial evidence:

> The premise of the board's decision—that Mr. Amador had admitted that his failure to work his deadline shift was the result of participating in a job action—has no substantial basis in the record.

(Pet. Brief 11).[2]

Mr. Amador identified the following as the only possible basis for the finding that he had admitted striking on August 6:

> QUESTION: Did you refuse to work commencing on the 3rd of August?
>
> MR. AMADOR: I did not work on August the 3rd.
>
> QUESTION: Did you work on August the 4th?
>
> MR. AMADOR: No, I did not.

---

2. The reference is to the "Substituted Brief for Petitioner" filed in the Court of Appeals.

QUESTION: Were you scheduled to work on the 4th?

MR. AMADOR: No, I was not.

QUESTION: Okay, moving on the 5th, did you work on the 5th?

MR. AMADOR: No, I did not.

QUESTION: Were you scheduled to work on the 5th?

MR. AMADOR: No, I was not.

QUESTION: Did you work on August 6th?

MR. AMADOR: No, I did not.

QUESTION: Were you scheduled to work on August the 6th?

MR. AMADOR: I was scheduled to work on August the 6th.

QUESTION: Now, was your failure to work on any of these dates that I've described a result of your participation in what you've called a job action?

MR. AMADOR: I would say yes.

(Jt.App. 98-9, *quoted* in Pet. Br. 7-8.)

Mr. Amador argued to the court that having just stated that

he was not scheduled to work on August 4, his "yes" answer to the "any of these dates" question clearly was intended to cover fewer than all of the dates (Pet. Br. 10). He argued further that since he had elsewhere in his testimony given a non-strike reason for his absence on August 6, the "yes" answer could not be fairly construed to cover that date any more than August 4 or 5 (Pet. Br. 10-11).

The government's brief conceded that the colloquy did not clearly constitute a statement by Mr. Amador that he was on strike on August 3, he was not on strike on August 4, he was not on strike on August 5, and he was on strike August 6; the brief argued that the MSPB's contruction should nevertheless be deferred to:

> We concede that the meaning of Mr. Amador's reply to agency counsel is open to interpretation. The presiding official interpreted it by determining that Mr. Amador had admitted that his absences on both August 3, and August 6, 1981, were due to strike participation. Jt. App. 33. In view of the presiding official's role as factfinder, and in light of the fact that the presiding official had an opportunity to hear the testimony first-hand and observe the demeanor of both the attorney posing the question and Mr. Amador, his determination regarding the meaning of that testimony is entitled to deference by this Court.

(Resp. Br. 12-3).[3]

The government did not indicate whether "deference" was short for upholding the finding if it was supported by substantial evidence or it was short for adopting the finding simply because

---

3. The reference is to the Brief for Respondent in the Court of Appeals.

it had been made by the board presiding official.

Mr. Amador requested oral argument before the Court of Appeals so that government counsel could demonstrate the differing types of demeanor which would have resulted in differing interpretations of this colloquy. Response to Notice Regarding Oral Argument. The court denied the request (App. 2).

Decision by the Court of Appeals

The court did not allude to, much less discuss, the fact that Mr. Amador challenged as unsupported by the evidence the finding that he had admitted striking on August 6. The court simply stated as a fact that the admission had been made:

> At the hearing before the presiding official of the Board, the petitioner admitted that he was absent from work on August 3 and 6 "because he was participating in a 'job action' against his employer."

(App. 3).

The court then turned to Mr. Amador's contention that his absence had resulted from his receipt of the agency's proposed discharge notice. The court listed a number of facts which the court apparently thought would have been relevant to a decision to accept or reject that contention, and suggested that these were circumstances leading to the Merit Systems Board's finding that Mr. Amador's August 6 absence was due to striking.

> [Mr. Amador] contends . . . that the reason he missed his deadline shift was that he received by regular mail a notice of proposed removal on the morning of August 6, 1981, prior to his deadline

> shift. The receipt for notice of proposed removal dated August 5, 1981, that the agency sent to the parties by certified mail, shows that the petitioner received that notice on August 11, 1981.
>
> Petitioner did not raise the claim that he had received the notice of proposed removal prior to this deadline shift on August 6, 1981, in his written reply to the notice of proposed removal (he did not make an oral reply), in his petition for appeal filed with the Board, or in his statement of issues filed with this court. Moreover, at the Board hearing, when asked whether, prior to receiving the notice of proposed termination, he had "planned to return to work that afternoon at 2:00 p.m.," the petitioner replied "I can't answer that . . . The decision was taken out of my hands. When I received a proposed removal, termination notice, I was accused of a crime. I didn't feel like talking to anybody in there." The petitioner was on the picket line on August 5, 1986.
>
> In these circumstances, the presiding official justifiably concluded that the petitioner had "not rebutted the agency's *prima facie* case that he voluntarily participated in the strike on August 3 and 6," and that the petitioner was absent without leave on those days.

(App. 3-5).

As noted above, the circumstance that the presiding official relied on was that Mr. Amador had admitted being guilty as charged. The presiding official did not intimate any other reason for disbelieving Mr. Amador's later testimony that his absence

was actually due to receipt of the August 5 discharge letter. And, of course, what Mr. Amador submitted to the court after the Merit Systems Board issued its decision was not a circumstance which could have been considered by the Board presiding official in the first place.[4]

REASONS FOR GRANTING THE WRIT

The writ should be granted because Mr. Amador had asked the Court of Appeals to carry out a critical function under the federal employment system—to determine whether the central finding of the Merit Systems Board was supported by substantial evidence—and the court's decision does not even reveal whether it attempted to do so.

A. SUBSTANTIAL EVIDENCE REVIEW IS A CRITICAL FUNCTION WITHIN THE FEDERAL EMPLOYMENT SYSTEM.

In cases where it has denied relief to federal employees, this Court has laid heavy stress on the fact that they already have effective procedural protections against improper discharges:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed..

Bush v. Lucas, 462 U.S. 367, 386 (1983).

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4. "*Post hoc: ergo, propter hoc* is not always sound reasoning. But *Ante hoc: ergo, non propter hoc* is unanswerable." 17 Works of Macaulay 107.

Similarly, in *Arnett v. Kennedy*, 416 U.S. 134 (1974) a majority of the court refused the claim of constitutional right to a pre-termination hearing for federal employees, but in doing so stressed that the statutory right to a post-termination hearing before the Civil Service Commission (now the Merit Systems Protection Board) ensured that constitutional due process would be provided. 416 U.S. at 157 (Rehnquist, J.), 416 U.S. at 179 (Powell, J.) and 416 U.S. at 200-202 (White, J.).

One element of the scheme referred to in *Bush v. Lucas* is that the Merit Systems Board must reinstate an employee unless the government has proven its case by a preponderance of the evidence:

> To begin with, the procedure provided by the civil service scheme is in many respects preferable to the judicial procedure under a Bivens action. See Brief for Respondent 18-21. For example, the burden of proof in an action before the Civil Service Commission (now the Merit Systems Protection Board) must be borne by the agency, rather than by the discharged employee.

Bush v. Lucas, 462 U.S. at 391 (Marshall, J., concurring).

Another element of the scheme is that even where the board has made a finding, under the preponderance of the evidence standard, adverse to the employee, the employee can have the Court of Appeals set it aside as being unsupported by substantial evidence:

> (c) In any case filed in the United States Court for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

* * *

(3) unsupported by substantial evidence; . . .

5 U.S.C. § 7703(c)(3).

In an earlier case involving the National Labor Relations Board, this court explained the value of substantial evidence review of administrative decisions:

> Congress has imposed on [reviewing courts] responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals.

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 490 (1951).

In sum, the discharge of a federal employee cannot be upheld unless a court "invested with the authority and enjoying the prestige of the Courts of Appeals" can find that the evidence supporting board findings adverse to the employee "appears substantial when viewed on the record as a whole."

B. MR. AMADOR MADE A NON-FRIVOLOUS ATTACK ON THE BOARD FINDING THAT HE ADMITTED BEING ON STRIKE ON AUGUST 6.

The factual question of whether, at his hearing, Mr. Amador admitted that his absence on August 6 was a result of striking is central to this case. If Mr. Amador did admit striking on August

6, the board was correct in ignoring his other testimony and—of course—was correct in finding that the agency had proven, by a preponderance of the evidence, that he was on strike that day. Certainly where the board decision is based on an admission that was actually made, it is supported by substantial evidence.

If Mr. Amador did not admit to striking on August 6, then the board decision sustaining Mr. Amador's discharge cannot be left standing. At minimum, the case would have to be remanded to the board for consideration of the facts with the purported admission left out of the calculus.[5]

The record as a whole contained Mr. Amador's testimony that his absence on August 3 was due to the strike; that his absence on August 4 was due to that being his day off; that his absence on August 5 was due to that also being his day off; and that his absence on August 6 was due to his receipt of the August 5 discharge notice. The only evidence that Mr. Amador admitted to striking on August 6 was that when asked if he had been on strike on "any of these dates," he answered in the affirmative.

Neither the employing agency, nor the board, nor the court

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5. It is, of course, possible that Mr. Amador was guilty of striking on August 6 even though he did not admit this. Presumably because of the perceived admission, the board did not determine whether, under the circumstances, Mr. Amador's receipt of the premature discharge notice exonerated him under the *Johnson* line of cases (above, p. 7), or whether there was a basis for distinguishing Mr. Amador's case from that line.

The fourth and fifth paragraphs of the Court of Appeals opinion appear to suggest that had the board rejected Mr. Amador's *Johnson* claim, the court would have affirmed the decision. However, a court may not affirm an administrative decision based on a rationale not adopted by the administrative agency itself. *Securities & Exchange Comm. v. Chenery*, 318 U.S. 80, 88 (1943), *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-9 (1962).

construed "any of these dates" as encompassing August 4 or 5, presumably because the record contained Mr. Amador's testimony that he was not scheduled to work those days. This is so even though the board and the court found that Mr. Amador had been scheduled for work on August 5[6] (App. 97 and App. 2). That is to say, the fact that Mr. Amador merely asserted a non-strike reason for his absence on August 5 meant that the admission of striking on "any of these dates," was not meant to cover August 5.

No reason was suggested by the court or the board for dealing any differently with August 6. That is, even if the tribunals disbelieved Mr. Amador's testimony that his absence that day was due to receipt of the premature discharge notice, the mere making of this defense made it clear that he was not admitting striking on that day. The Court of Appeals would not have been able to uphold the finding of an admission of striking on August 6 without explaining why no weight could be given to the fact that Mr. Amador had testified to a different reason for his absence that day. Since no such explanation even appears possible, Mr. Amador's argument that the board finding was unsupported by substantial evidence deserved serious treatment by the court.

C. AN APPELLATE COURT DECISION MUST AT LEAST REVEAL WHAT STANDARD OF REVIEW WAS APPLIED RESULTING IN THE COURT'S DECLARATION OF THE FACTS.

It is not clear whether the Court of Appeals believed it could adopt the board's finding that Mr. Amador had admitted striking on August 6 without determining whether that finding was supported by substantial evidence, or whether the court determined

---

6. To avoid confusion, we stress here that Mr. Amador was not found guilty of striking on August 5. The alleged strike absences were only those of August 3 and 6.

that that finding was indeed sufficiently supported. If the latter was the case, the lack of discussion makes it impossible to determine whether the court relied only on those portions of the record which supported the board's interpretation, or whether it considered the record as a whole. In short, the court here acted precisely as it had in a recent patent case in which it reviewed district court fact findings without indicating what standards of review it was applying:

> [W]hether or not the ultimate question of obviousness is a question of fact subject to Rule 52(a), the subsidiary determinations of the District Court, at least, ought to be subject to the Rule.
>
> The Federal Circuit, however, did not mention Rule 52(a), did not explicitly apply the clearly-erroneous standard to any of the District Court's findings on obviousness and did not explain why, if it was of that view, Rule 52(a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which obviousness determinations is one of fact.

Dennison Mfg. Co. v. Panduit Corp., ____ U.S. ____, 89 L. Ed. 2d 817, 821-2 (1986).

Mr. Amador was not entitled to error-free proceedings either at the administrative or judicial levels. He was entitled, however, to assurance that the Court of Appeals did review the board record and judge it according to the substantial evidence standard. As in the case just quoted, this Court should remand this case to the Court of Appeals so that there can at least be "an adequate explanation of the basis of the Court of Appeals judgment."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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August 27, 1986

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UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

ARTHUR AMADOR,	)	Appeal No. 85-1275
Petitioner,	)	
v.	)	MSPB Docket No.
DEPARTMENT OF	)	SF075281F3526
TRANSPORTATION,	)	
FAA,	)	
Respondent.	)	

DECIDED: April 17, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal

Aviation Administration, Department of Transportation, is affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

The petitioner was scheduled to work on August 3 (the day on which the illegal air traffic controllers strike began), 5 and 6, 1981, but did not report on any of those dates. His "deadline" shift, under the Presidential amnesty giving the

strikers 48 hours within which to report for work, was the 2 p.m. shift on August 6, 1981. At the hearing before the presiding official of the Board, the petitioner admitted that he was absent from work on August 3 and 6 "because he was participating in a 'job action' against his employer."

The petitioner does not deny that under Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), the agency established a prima facie case of strike participation. He contends, however, that the reason he missed his deadline shift was that he received by regular mail a notice of proposed removal on the morning of August 6, 1981, prior to his deadline shift. The receipt for notice of

proposed removal dated August 5, 1981, that the agency sent to the parties by certified mail, shows that the petitioner received that notice on August 11, 1981.

Petitioner did not raise the claim that he had received the notice of proposed removal prior to his deadline shift on August 6, 1981, in his written reply to the notice of proposed removal (he did not make an oral reply), in his petition for appeal filed with the Board, or in his statement of issues filed with this court. Moreover, at the Board hearing, when asked whether, prior to receiving the notice of proposed termination, he had "planned to return to work that afternoon at 2:00 p.m.," the petitioner replied "I can't answer that. ... The decision was taken out of my hands. When I received a proposed

removal, termination notice, I was accused of a crime. I didn't feel like talking to anybody in there." The petitioner was on the picket line on August 5, 1986.

In these circumstances, the presiding official justifiably concluded that the petitioner had "not rebutted the agency's prima facie case that he voluntarily participated in the strike on August 3 and 6," and that the petitioner was absent without leave on those days.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

ARTHUR AMADOR,) Appeal No. 85-1275

Petitioner,)

v.) MSPB Docket No.

DEPARTMENT OF) SF075281F3526

TRANSPORTATION,)

FAA,)

Respondent.)

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

By: Diane Frye, Chief
Deputy Clerk
Francis X. Gindhart, Clerk

5/29/86
Date

cc: Mr. Phillip R. Kete
Ms. Sandra P. Spooner, DOJ

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SAN FRANCISCO REGIONAL OFFICE

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ARTHUR AMADOR, et al.	)	Decision No.
Appellants,	)	SF075281F3526
v.	)	DATE:
DEPARTMENT OF	)	JANUARY 20,
TRANSPORTATION, FEDERAL	)	1983
AVIATION ADMINISTRATION,	)	
Respondents.	)	

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INTRODUCTION

By petitions filed in September, 1981, appellants appealed the action of the U.S. Department of Transportation, Federal Aviation Administration, Las Vegas, Nevada (the agency) which removed them from the positions of air Traffic Control Specialists on various days

during the months of August and September 1981.1/

On appeal, before the Board appellants seek a reversal of the agency removal decisions.

JURISDICTION

Appellants are entitled to appeal their removals to the Board pursuant to 5 U.S.C. Section 7513(d) and Section 7701(a) on the grounds that each was an "employee" as defined by 5 U.S.C. Section 7511(a)(1)(A) and their removal actions are covered by 5 U.S.C. Section 7512.

BACKGROUND

On August 3, 1981 at 7:00 a.m. Eastern Daylight Time (EDT), an illegal nationwide strike of Air Traffic Control Speci4lists began. Over 70 percent of the nation's controllers walked off the job, causing a significant reduction in

private, commercial and military flights in the United States.2/

At 11:00 a.m. EDT (8:00 a.m. Pacific Daylight Time), the President of the United States, Ronald Reagan, appeared on national television and stated:

> "...I must tell those who failed to report for duty this morning they are in violation of the law and if they do not report for work within 48 hours they have forfeited their jobs and will be terminated."3/

The agency did not discipline those controllers who returned to work within their deadline even though they may have actually participated in the strike prior to that time.4/

In implementing the President's amnesty deadline, the Federal Aviation Administration (FAA or Agency) originally

advised its facility chiefs that notices of proposed removal would be issued to those controllers "not reporting for duty as scheduled after 11:00 a.m. Wednesday, August 5, 1981, or the first shift thereafter to which they are directed or scheduled to report" (GENOT 127).5/ Later the agency interpreted the President's statement to mean that notices of proposed removal be issued at 8:00 a.m. on August 5 to any absent controllers who were scheduled to be working at that time, regardless of when their shift had commenced, and to all other controllers as they failed to appear for their first scheduled shift thereafter. (GENOT 128).

Still later the agency clarified its interpretation to mean that notices of proposed removal would be issued only to

controllers who failed to appear for their first scheduled shift commencing at or after 8:00 a.m. on August 5, 1981.

The Deciding Officials in this case made no attempt to advise the appellants of how the FAA had decided to interpret the 48 hour deadline set by President Reagan.

By the end of August 1981, all of the appellants in this case had missed their amnesty deadline and had been served with notices of proposed removal.

The notices uniformly charged each appellant with participating in a strike from the time of his/her first scheduled shift on or after August 3, 1981 "to the present", i.e., the date of issuance of the notice.

The proposal notices also advised appellants that they had seven days to

reply to the charges, and that they should contact the facility if they wished to review the material relied upon by the agency to support the charges. A phone number and the name of the individual to contact at the agency was provided.

Finally, the appellants were advised that they could reply to the charges personally, in writing or both.

Over 95 percent of the 26 appellants in this case responded to the proposal notices with form letters provided by their union, PATCO. Those form letters did not explain the appellants' absences and neither denied nor affirmed the strike participation charge.6/ Less than 2 percent of the appellants elected to give an oral reply to the charges.

By the end of September, 1981, all

of the appellants had been served with the agency's final adverse decision. The final decision letters informed the appellants that their written submissions and oral replies (where applicable) had been fully considered and that it had been concluded by the deciding official that the charges against them were fully supported and warranted their removal to promote the efficiency of the service.

From the above adverse decisions the appellants have effected the present appeals.

The appellate record in each case consists of the agency's adverse action file (AF), appellant's petition (AP), a transcript of the individual tower hearings (H.T.), and exhibits introduced by the parties (Ex.). Except for the filing of post hearing briefs the record

was closed at the conclusion of the tower hearings.

GENERAL LAW

Removal is an adverse action covered by Title 5, United States Code, Section 7512. In order to sustain an adverse action the agency must prove that the employee misconduct charged actually occurred, and that the disciplinary action taken in response promotes the efficiency of the service. 5 U.S.C. Section 7513(a); Allen v. U.S. Postal Service, 2 MSPB 582 (1980); and Phillips v. Bergland, 586 F.2d 1007, 1010 (4th Cir. 1978).

An adverse action promotes the efficiency of the service and warrants the imposition of some penalty when the grounds for the action relate to "... either the employee's ability to

accomplish his or her duties satisfactorily or some other legitimate government interest ..." McClelland v. Andrus, 606 F.2d 1279, 1291 (D.C. Cir. 1980), quoting Doe v. Hampton, 556 F.2d 265, 272 (D.C. Cir. 1977). See also, Pezza v. Department of Health and Human Services, 3 MSPB 167 (19800. Once the alleged conduct and its requisite relationship (nexus) to the efficiency of the service has been shown, thus warranting some form of discipline, a third distinct element enters, and that is the reasonableness of the particular penalty imposed. Douglas v. Veterans Administration, MSPB Order No. ATO75299006, at 28-29 (April 10, 1981).

Thus, to summarize, three distinct elements must be shown in any conduct-based adverse action: 1) that the

employee conduct alleged in fact occurred, 2) that there was a nexus between the conduct and the efficiency of the service, warranting some penalty, and 3) that the penalty imposed was reasonable. Douglas, supra, and Davis v. Department of the Treasury, MSPB Order No. NY075209075 (October 2, 1981).

Further, 5 U.S.C. Section 7701(c)(1)(B) provides in pertinent part that the decision of the agency shall be sustained only if the agency's decision is supported by a preponderance of the evidence. This standard of proof is defined as:

> That degree of relevant evidence which a reasonable mind considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely true

than not true.

5 C.F.R. Section 1201.56(c)(2). See also, Parker v. Defense Logistics Agency, 1 MSPB 489 (1980). The agency must establish every material element of its case by a preponderance of the evidence. In re Van Sciver, 1 MSPB 94 (1979); Bavier v. Department of Transportation, MSPB Order No. SEO75209009 (February 10, 1981); McDonough v. U.S. Postal Service, 5 MSPB 441 (1980).

Accordingly, the preponderance of the evidence standard will be applied to the evidence presented by the agency in support of its decision to remove appellants.

ANALYSIS, FINDINGS AND CONCLUSIONS OF LAW

As the background facts above indicate the agency and the President of the United States both initially

attempted to bring the strike to an end by means other than administrative discharge of the appellants. Both locally and nationally, the agency sought temporary restraining orders, and back-to-work injunctions at the commencement of the strike. These attempts were generally unsuccessful. The President's amnesty period represents another attempt to get striking controllers back to work instead of taking adverse actions. When these methods failed to end the strike, the agency effected almost 11,000 adverse actions against the striking controllers, including the appellants in this case. This action was literally an unprecedented act in the history of labor relations within the U.S. Government. Consequently, all of the deciding officials in this case required and

received direction, guidance and instruction in the proper procedures to effect appellants' removals.

Although few of the appellants in this case gave oral replies to the charges through their counsel, they raised numerous substantive and procedural allegations concerning the manner and means by which their removals were effected.

In their closing briefs and throughout the hearings, appellants advanced the following arguments:

1. Was removal a reasonable and appropriate penalty to impose on the appellants under the circumstances;

2. Did a strike occur;

3. Did the agency arbitrarily enforce 5 U.S.C. Section 7311;

4. When was the strike over;

5. Can the controller be discharged for participating in a strike in August 1981;

6. Did the appellants, as individuals, participate in a strike;

7. Are there mitigating circumstances which would mitigate the penalty;

8. Was there a valid cancellation of leave or assignments of overtime;

9. Was the seven day response period legally sufficient;

10. Were the appellants allowed a meaningful opportunity to reply;

11. Were appellants victims of double jeopardy or double punishment;

12. Did removal promote the efficiency of the service;

13. What weight should be given to the demeanor of the witnesses;

14. What inference may be drawn from an appellant's failure to testify;

15. Were some of the appellants victims of illegal entrapment; and

16. What weight ought to be given to the appointment affidavits.

As much as possible the above arguments which are "common" to all appellants in this case will be discussed below as they relate to the major issues raised by these cases. Of necessity, the following topical discussions will entail findings on the charged conduct, the penalty, and the efficiency of the service. Specific evidence or arguments raised by individual appellants to the extent not already covered will be addressed separately.

Issues Related to Strike Participation

At the outset a brief comment on the

exact nature of the charges against the appellants is necessary. All of the appellants in this case were charged with participating in a strike against the government and being absent without official leave.

Unlike private sector employees, federal employees, as were all of the appellants in this case, are specifically prohibited from participating in a strike against their employer.7/ Since 1946 Congress has continuously prohibited strikes by federal employees and has provided sanctions including dismissal, fine and imprisonment to prevent strikes by federal employees. See, United Federation of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.) aff'd, 404 U.S. 802 (1971). Title 18 of the United States Code, Section 1918 makes

participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.8/ Additionally, the no-strike provision of Title 5, Section 7311 is clear and unequivocal regarding the immediate consequences that face an employee engaged in a strike: "An employee may not hold...a position in the Government of the United States...if he ...participates in a strike."

As the Supreme Court noted in Amell v. United States, 384 U.S. 158, 161 (1966), federal employees "are forbidden, under pain of discharge, fine and imprisonment, from exercising... a right to strike.:." (Emphasis added). During debates on the Civil Service Reform Act of 1978, Congress reiterated the purpose for the prohibition on strikes by federal

employees:

> The primary reason for Government services is to supply the public with certain essentials of life which cannot reasonably be supplied by the average citizen...or to him by private enterprise...Because these services are essential to the health, welfare and safety of the public...it becomes intolerable that they be interrupted. 124 Cong. Rec. H. 9651 (daily ed.Sept. 13, 1981)(Remarks of Rep. Rouselot) (Emphasis added).

Finally it is obvious that Congress has the obligation to ensure that the machinery of the federal government continues to function at all times without interruption, and that the prohibition against strikes by government employees is one of the methods Congress

chose to implement that obligation. Blount, supra.

1. The Agency's Prima Facie Case of Strike Participation.

This Board was fully cognizant of the legal proscriptions against and the public policy reasons supporting the prohibition against striking by federal employees when it decided Schapansky v. Federal Aviation Administration, MSPB Docket No. DA075281F1130 (October 28, 1982).

The Schapansky case involved charges identical to those of the appellants in this case. Indeed, the case addresses the same strike participation which is the subject of the 26 appeals in this case.

After reviewing the evidence of the strike's existence, photographs of

appellants among picketers, and evidence of appellant's unauthorized absence during the strike, the Board held that once the existence of the strike has been established, the agency may support a prima facie case that an employee voluntarily participated therein by presenting evidence of his/her unauthorized absence from duty during the strike. Schapansky, supra, at 6.

Thus, the Board concluded that with regard to the essential evidence necessary to prove the charge of strike participation that it is an employee's voluntary withholding of services in concert with others, and not the physical presence of the employee on the picket line which constitutes the gravamen of such a charge. Schapansky, supra. Consequently, all the agency need

show to establish a prima facie case of strike participation by a federal employee is:

(1) the existence of a strike; (2) that the employee was scheduled for and absent from duty during the strike; and (3) that the employee's absences were not authorized.

Once the agency establishes its prima facie case of strike participation, the evidentiary burden shifts to the appellant to go forward with evidence which rebuts the agency's prima facie case.

Of course, the ultimate burden of persuasion or the risk of non-persuasion, remains with the agency. At this point, in order to overcome the presumption that he/she participated in the strike, the appellant must show by a

preponderance of the evidence at least one of the following: (1) that he/she had no knowledge of the existence of the strike; or, (2) that his/her absence was due to some factor other than intentional participation in the strike. Schapansky, supra.

Accordingly, I find that in these cases the agency may establish a prima facie case of an employee's strike participation by presenting evidence which shows (1) the strike's existence; (2) the strike's duration during the period that the appellants were charged; and, (3) that the appellants were scheduled for and absent from duty during the strike.

The definition of what conduct constitutes "participation in a strike" has been defined by the court as "an

actual refusal in concert with others to provide services to one's employer." United Federation of Postal Clerks v. Blount, 325 F. Supp. 879, 884 (D.D.C.) aff'd 404 U.S. 802 (1971).

In a long line of cases dealing with whether an individual's actions can be deemed to be part of a "concerted activity" under the National Labor Relations Act, the courts have held that individual actions can be considered to have been done in concert with other employees, Anchortank, Inc. v. NLRB, 618 F.2d. 1153, 1161 (5th Cir. 1980); if the actions themselves "at least contemplate group activity," Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28 (7th Cir. 1980); or if the actions amount to action on behalf of other employees, Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir. 1979).

In my view, the term "in concert" as it is used in the Blount definition of strike participation (an actual refusal in concert with others to provide services to one's employer) does not require simultaneous or contemporaneous conduct. "Concerted action" is action that has been planned, arranged, adjusted, agreed upon and settled between parties acting together, in pursuance of some scheme. Thus, the "actual refusal" of one employee to provide his/her services on a particular day does not necessarily have to occur at precisely the same time another employee refuses if both refusals arise out of a pre-existent agreement, are part of the same transaction, are intended to be mutually supportive, and/or are directed toward a common goal.9/

Any argument that appellants' unexplained absences beginning on August 3, were not in concert "strains credulity" given the fact that the controller's union (PATCO) had announced its intention to strike approximately two months in advance, 70 percent of the nation's controllers walked off the job on August 3, and there was continuous picketing at the facilities involved in this case throughout the months of August and September. Accordingly, I find that each appellant in this case who withheld his/her services did so in concert with others by withholding their services during their scheduled shifts. Under the circumstances of these cases to find otherwise would lead to the absurd result that regardless of the evidence presented against him/her, the last

controller removed at every tower could not be found to have participated in the strike, for lack of a co-worker to be "in concert" with.

Finally, the offense of participating in a strike while holding a position in the Federal Government requires an intent which is general; one must intend only to do the act which is proscribed.10/ Evidence of absence without authorization or explanation when an appellant is scheduled and when the strike was in progress is circumstantial evidence of an intent to participate in the strike. Circumstantial evidence is generally used to prove intent, which being a state of mind, can seldom be proved directly. Tucker v. United States, 624 F.2d 1029 (Ct. Cl. 1980); Filson v. Department of

Transportation, MSPB Docket No. DA075209304 (July 14, 1981); See also, Melillo v. United States Postal Service, MSPB Docket No. DA075209240 (January 8, 1981).

2. Duration of the Strike

On the issue of the strike's duration, I find that since the Board has already taken official notice that the strike existed on August 3 and continued at least through August 6, the agency must present evidence to show the strike's continuation up to and including the last day that any appellant in this case could have returned to work. In this regard the evidence at the hearings shows that the agency would not have permitted any appellant to return to work after they missed their amnesty deadline shift. The last day that any of the

appellants would have been allowed to return to work in this case is August 8, 1981.

At the hearings in these cases, the agency presenqed the following evidence on the strike's duration. The facility chiefs for both Las Vegas towers testified that they experienced widespread absenteeism up to and including the date that the last controller at each tower was served with a notice of proposed removal. The facility chiefs also testified that picketing continued at McCarson Airport, in Las Vegas, Nevada, throughout the months of August and September and that there was sporadic picketing during October. The agency also presented testimony by both facility chiefs that the PATCO hotline continued to operate

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throughout the months of August, September and October.

In support of their argument that the strike ended with President Reagan's deadline on August 5, 1981, appellants point to various press releases by Secretary of Transportation Drew Lewis (Exh. 3) and various court decisions ruling that the strike was over as early as August 5 or 6.11/ However, I do not find this argument persuasive. The issue of strike continuation, like the issue of whether one is acting "in concert", is a question of fact to be decided on a case-by-case basis. The determination depends in large part on the purpose for which the finding is being made.

It is true, as the excerpts of press releases submitted by appellants

illustrate, that Secretary Lewis (as well as other members of the Administration) made statements as early as August 5 that the "strike was over."

After reviewing these statements, I find that Secretary Lewis and other Government officers were not attempting to say the strike was over as a matter of law. They were merely stating the Department of Transportation's position as a practical matter, i.e., that no further attempts would be made to force PATCO to cease striking but rather all energies would be devoted to replacing the strikers.

Likewise, the court decisions refusing to continue enforcement of injunctions and the fining of contemnors were based on findings that either the union, as an organizational entity, could

not comply with court orders where the majority (though not all) of its members could not return to work or that individual contemnors could not be punished when they personally could not return to work. The holdings of these cases do not mean that the strike was over for all purposes and all employees.

Clearly, if no striking employees can return to work, there is no strike as a matter of law for any purpose. And, an individual employee may not be found guilty of strike participation for any time period during which he/she is unable to return to work. See Tennessee Valley Authority v. Bailey, 495 F. Supp. 711, 712-13 (E.D.Tenn. 1980). However, I do not believe that a strike is "over" as long as one employee, such as the appellant whose amnesty deadline was on

August 8 could still have returned to work and other employees, who had previously been striking, continued to engage in strike-related activities such as picketing even though they themselves were not able to return to work. In other words, an employee does not become immunized from a finding of strike participation merely because he/she may be the last employee who still would be allowed to return to work.

Activities such as picketing, even though carried on by former employees who can no longer return to work, are clearly designed to influence others (members of the public, non-striking controllers, other unions) to support the goals for which the strike was initiated in the first instance. In this case, the agency presented substantial evidence to

show that strike activity by PATCO and its members continued through August and September and even into October both locally and nationally.

Furthermore, the President's amnesty deadline was not a fixed deadline. Each of the appellants had different deadlines because of their assigned shifts, regular days off, and the inability of the agency to notify and cancel annual leave in specific instances. The evidence that all of the appellants in this case were removed on different dates and charged strike participation and AWOL on different dates is clear from the record.

Moreover, Secretary Lewis or other government officials, including the President, could no more call the strike off than they could initiate it. Any statement made by a cabinet member with

no obvious authority to call off a strike initiated by a union of which he was not a member, must surely be considered mere political rhetoric.12/ The Board in Ketchem officially noticed the strike from August 3 through 6, 1981, notwithstanding Secretary Lewis' statement quoted therein that the strike was over at 11:00 a.m. on August 5, 1981. Ketchem, supra, at 6.

Appellants also argue that evidence of individual conduct prior to his or her deadline shift is unreliable on the issue of intent or state of mind and should be given no weight. They argue that no probative correlation exists between a controller's activity on the first two days of the strike and any intent to participate in the strike thereafter. I find this argument to be without merit.

First, if an appellant was charged with participation in the strike on the first two days, evidence of that appellant's activity on those days is obviously directly relevant to the charges. However, even if an appellant is not charged with striking or AWOL prior to his or her deadline shift, evidence of such conduct would be relevant circumstantial evidence of intent. Circumstantial evidence is generally used to prove intent which, being a state of mind, can seldom be proved directly. Melillo v. U.S. Postal Service, supra.

Appellants argue that evidence of picketing or other strike-related activity occurring after the date of the proposed notices or after the deadline shift lacks probative value and should be

rejected. Appellants further argue that absence after the expiration of their deadline doesnot amount to striking or AWOL because they had already been fired and would not have been allowed to report for work.13/

The Board held in Ketchem that where an employee is charged with striking on dates subsequent to the officially noticed period of the strike, the agency bears the burden of proving not only that the strike was in progress, but also that the employee could have returned to work on the date charged. Id. at 9. Thus, because the record reflects that appellants would not have been allowed to report to work after missing their deadline shifts, appellants cannot be found to have been on strike or AWOL after their deadline shifts.

In most cases, removal was proposed on the same day as the deadline shifts. In those cases where the proposal notice is dated subsequent to the deadline shift, an appellant cannot be found to have been on strike or AWOL on dates subsequent to the deadline shift. A charge of striking will be sustained, however, upon the requisite proof of striking on any of the dates charged.

I find unpersuasive appellant's argument that evidence of strike-related activity after the deadline shift lacks probative value. Like evidence of strike-related conduct prior to the deadline shift, this evidence has some relevance to the charges. Evidence of picketing activities becomes so attentuated that it lacks probative value where it is shown to have occurred when a

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controller is no longer a Federal employee. Although this type of evidence is not itself sufficient to carry the burden of the agency, it is of sufficient relevance that it will be considered with all the other evidence on the charges.

3. "Confusion" as Rebuttal Evidence.

Appellants argue that the FAA cannot meet its burden of showing strike participation because there existed considerable confusion as to when a controller could return to duty. They argue that because the FAA bears the burden of proving that a controller could have returned to work, the FAA was required to provide appellants with notice of their deadline shifts.

Appellants further argue that President Reagan's nationally televised statement set the deadline at 8:00 a.m.

EDT on August 5, 1981. They argue that this notice failed to inform appellants that they could report at a later time and that they, therefore, could have reasonably believed that regardless of their work schedule, they were fired if they had not reported to work by 8:00 a.m. on August 5.

It is patently obvious to me that controllers who were genuinely interested in returning to work would have returned by 8:00 a.m. August 5, if they believed, as appellants assert, that they would be fired if they did not. It is equally obvious that controllers who were both interested in returning to work and genuinely confused about their ability to return would have contacted their superiors who could give authoritative information regarding their status.

Confusion as to whether an appellant could have reported to work is obviously an individual issue. Conflicting or differing statements reported in the media are insufficient to support a finding of mass confusion without specific evidence that individuals were in fact confused. Evidence of confusion was entertained at individual hearings when offered and will be discussed where appropriate in another portion of this decision. However, in my view, unless an appellant called his/her supervisor to clarify their deadline shift, the argument that they were confused, without more, fails.

4. Approved Leave as Rebuttal Evidence.

Appellants argue that they cannot be found to have been on strike or AWOL on

days they were not scheduled to work because they were on approved leave. This is not true, however, if the leave was properly cancelled.

The proper cancellation of leave involves several considerations. One is notice. It is obvious that a duty to report to work prior to the expiration of a period of leave arose only if an appellant was notified that leave was cancelled. The adequacy of the notice will be reviewed where appropriate on an individual basis.

5. Annual Leave.

The PATCO-FAA collective bargaining agreement provides that annual leave shall not be cancelled or rescheduled except for an operational emergency or at the request of the employee.13/

Appellants argue that the agency did

not formally declare an operational emergency and thus annual leave cancelled in August 1981 was not properly cancelled. The contract is silent as to whether an operational emergency must be formally declared. Appellants have cited absolutely no authority for their position that an operational emergency must be declared formally. Absent any contrary language in the contract itself or other authority, I will construe the language literally. The language simply requires that an operational emergency exist.

As noted above, the contract is silent as to what constitutes an operational emergency. However, I find that in the absence of a specific exclusion by the contract or other authority, a nationwide strike against

the FAA is such an emergency. The record reflects that many controllers as well as facility chiefs and supervisors were transferred to other facilities within this region which were more affected by the absenteeism than others. Because the agency conducts business on a national and international level, and since the strike was nationwide in scope, and the contract bound two national organizations, I find that the national emergency resulting from the PATCO strike was a sufficient and proper basis for the cancellation of the annual leave approved for appellants herein.

I also find that cancellation of leave in anticipation of an operational emergency is synonymous with the contract provision. The determinative factor is not when the leave is granted

or cancelled but when the leave is scheduled. If leave is scheduled during an anticipated emergency, it can be cancelled before the emergency.

On a related issue I also find the emergency scheduling of employees for overtime shifts to be appropriate during the pendency of the strike. Accordingly, since I have already found that an operational emergency existed, I find the orders of facility chiefs Barker and Kemple directing controllers to report for work appropriate under the exigent circumstances that existed during that period of the strike. I note that none of the appellants who were ordered to report for work did so. Furthermore, I note that the August 5 order by Chief Barker amounted to an extension of the President's amnesty deadline for certain

appellants.

Sick Leave.

As with annual leave, Federal employees had no right to sick leave until Congress enacted legislation14/ in 1936 granting the leave to them. However, unlike the annual leave situation, this legislation included no provision giving the agency head discretion to control granting of the leave to qualified individuals. The language of the 1936 statute, "all civilian officers and employees...shall be entitled to sick leave with pay..." was left unchanged in the 1951 Act15/ which repealed the 1936 statute. The current statute16/ reads "An employee is entitled to sick leave..." However, while the statutory provision drops the use of "shall", it appears in OPM's

regulations. 5 C.F.R. Section 630.401 states "An agency shall grant sick leave to an employee..." (emphasis added).

This language, "shall grant", was construed by the Court in Miller v. Bond, 641 F.2d 997 (D.C. Cir. 1981), to mean that the FAA could not make arbitrary decisions with respect to the granting of sick leave. This case arose from the FAA's attempt to discipline air traffic controllers who participated in the 1970 "sick out". The court stated that no agency had the discretion to refuse sick leave for a qualified applicant for sick leave. Though the court recognized that the agency had the right to determine who qualified for the sick leave, it ruled that the determination could not be made arbitrarily and had to be based on reasonable criteria of which the

employees were made aware.

Based upon this decision and the regulatory language, I find that once the FAA determined that a controller was a qualified applicant for sick leave and granted the controller the sick leave, that controller had an absolute right to the leave until and unless it was determined that he or she was no longer qualified. Additionally, where the agency denies sick leave, it must prove the propriety of its denial by a preponderance of the evidence. Bavier, supra.

6. The FAA's Documentary Evidence.

Appellants argue that certain of the FAA's evidence in individual cases should not have been admitted and also that most of the evidence that was properly admitted is entitled to little if any

weight. Objections to the admissibility of evidence were made and ruled upon at the facility hearings and will not be further discussed here. The probative value of and the weight to be accorded that evidence will be discussed below.

a. Time and Attendance Record, Watch Schedules, and Sign-In Logs.

The appellants argue that time and attendance records (T & A cards) were prepared for payroll purposes and as a secondary evidence are unreliable for determining whether a controller was actually absent. It is well established that secondary evidence is properly admissible in proceedings before the Board. De Bose v. Department of Agriculture, MSPB Docket No. SE0758010024 (March 17, 1981). Moreover,

appellants were afforded an opportunity to cross-examine witnesses regarding the accuracy of the documents.

Appellants also argue that the documents do not themselves reflect how they were filled out and that because the T & A clerk was not produced as a witness, the testimony of the facility chiefs, who lacked personal knowledge, was unreliable. This argument is without merit. All facility chiefs testified that they had personal knowledge as to how and when the T & A cards were maintained and by whom.

Appellants argue that errors in T & A cards or conflicts between information contained therein and information contained on watch schedules and sign-in logs show that the FAA's documents were, as a whole, unreliable.

The Board has determined, however, that evidentiary submissions in the form of work schedules and T & A cards constitute sufficient proof of an employee's attendance status. Cusick v. Department of the Army, MSPB Docket No. PH07528110188 (June 15, 1982). The watch schedules, sign-in logs, and T & A cards submitted in these cases show appellants' work schedules and whether or not they reported for duty. The probative value necessarily rests on the circumstances of each case.

b. Appointment Affidavits, Memoranda of Briefing Sessions, Helms Letter, Telegrams, Photographs, and Newspaper Articles.

Appellants objected to the admission of all of the above evidence for various

reasons noted in the transcripts of the various hearings. All of this evidence was admitted but will be given little if any weight.

The appointment affidavits, memoranda of briefing sessions, and Helms letter were introduced to show appellants' prior knowledge of the illegality of the strike. This is not a disputed fact. Similarly, the telegrams which show that the FAA made an attempt to contact all absent controllers after the commencement of the strike, have no bearing on any of the generally disputed facts. They will be considered, however, where an appellant claims no knowledge of the strike. Newspaper articles have little if any probative value on the issue of an appellant's conduct or intent.

Of all of the evidence objected to, photographs of the appellants engaged in picketing activity is relevant but only if they can be identified as such. I have already found that evidence of picketing activity before and after the strike has some probative value. Thus, photographs of that activity is of equal value. However, those photographs that do not clearly and unambiguously demonstrate picketing activity by a specific appellant on a specific are entitled to no weight. Finally, the observations of picketing activity and the testimony of such where appropriate will be accorded due weight.

The Applicable Standard of Procedural Error.

Even though an agency carries its initial burden, the action cannot be

sustained if it involved harmful procedural error, a prohibited personnel practice, or was otherwise not in accordance with law. 5 U.S.C. Section 7701(c)(2). See also 5 C.F.R. Section 1201.56(b)(1). These are affirmative defenses to an otherwise legitimate agency action. The burden of proving all affirmative defenses rests with the appellant. Martinez v. Department of Defense, 4 MSPB 109 (1980). The applicable standard of proof is a preponderance of the evidence. Pinto v. Department of Labor, MSPB Docket No. DE07528010140, at 2 (May 11, 1982).

Harmful procedural error has been defined by the Board at 5 C.F.R. Section 1201.56(c)(3), as "error by the agency in the application of its procedures which, in the absence or cure of the error,

might have caused the agency to reach a conclusion different than the one reached." See also, Parker v. Defense Logistics Agency, 1 MSPB 489, 493 (1980). Actual prejudice must be shown; the theoretical possibility of prejudice is not sufficient. Parker, at 493.

In contrast, the agency actions found to be "not in accordance with the law" are reversible without a harmful error analysis. Cuellar v. U.S. Postal Service, MSPB Docket No. SF075299045, at 11 (November 13, 1981).

The Parker decision represents the Board's first significant harmful error decision. In that decision the Board reviewed appellant's claim that she was improperly denied a within grade increase because she was not provided the full waiting period and her claim that a

summary of the personal representation made by her had not been included in the reconsideration file. Both claims were violative of government regulations. Because the claims involved "procedures in arriving at" the challenged decision, a harmful error analysis was applied by the Board. However, neither claim was found to be harmful since the appellant did not show that the agency would have reached a different conclusion in the absence of the errors. 5 C.F.R. Section 1201.56(c)(3); and Parker at 493.

More recently, the Board decided Johnson v. Department of the Treasury, MSPB Docket No. DC075209213 (August 27, 1982) wherein it decided that the failure to provide an appellant with the full seven day reply period provided by 5 U.S.C. Section 7513(b)(2) warranted a

harmful error analysis and on that basis the error was found not harmful.

With a few exceptions, the Board has consistently applied the harmful error standard to appeals challenging "the agency's procedures in arriving" at its decision.17/ The cases cited in the preceding footnote make it clear that the agency's implementation of the rights guaranteed by 5 U.S.C. Section 7513(b) are "procedures in arriving at [the agency] decision," and, therefore, the harmful error analysis is applicable.

The Legislative history of the CSRA confirms such an interpretation. One of the primary legislatiave concerns was that the ability to fire Federal employees had become a lengthy and bureaucratic nightmare.18/ Thus Committees in both the House19/ and

Senate,20/ testimony before the Committees,21/ and floor debate in both the House,22/ and Senate all expressed a need to make it easier to discipline employees.

In light of such a concern, it is implausible that the legislators intended that agency actions would be overturned for technical non-compliance with procedural provisions absent a showing that the agency conclusion would have been different. Accordingly, a harmful error analysis will be applied to the following procedural error arguments raised by appellants.

Procedural Errors.

a. Command Influence.

Appellants argue that they were not afforded a meaningful opportunity for an oral or written reply. The thrust of

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this claim is that the deciding officials were stripped of all discretion to decide the merits of each individual case. Appellants allege that the deciding officials were mere puppets of the President and the FAA officials who had pre-determined the plight of the controllers through a series of instructions.

The testimony on this issue and the ma6y exhibits in form of GENOTS and RENOTS establishes that the deciding officials, who were generally the proposing and oral reply officials, had little to no discretion in how the removals were effected. The evidence also establishes, however, that the deciding officials did have discretion to determine if a controller was on strike. They were essentially directed to find

that a controller was on strike if he or she was absent without authorization when scheduled and failed to either return within the deadline or prevent a legitimate excuse for his or her absence. This determination was obviously the most important one to be made, not whether the crime exception should be invoked or whether form letters should be used. Those decisions were properly left to the lawyers and labor relations staff.

Thus, I find appellants' argument that command influence rendered their opportunity to reply meaningless, to be without merit. Deciding officials were empowered with the authority to make crucial fact findings based on the replies of the appellants. The vast majority of appellants simply chose not to provide a responsive reply to the

charges of striking to the deciding official or to me.

b. Invocation of Crime Exception and Reasonableness of Seven Days to Reply.

Appellants argue that the FAA acted improperly in relying on the shortened not;ce period pursuant to 5 U.S.C. Section 7513(b). Title 5 U.S.C. Section 7513(b) provides that an employee is entitled to at least 30 days' advance written notice of a proposed adverse action, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, in which instance the employee is entitled to a reasonable time, but not less than seven days, to respond. In this case, the notices of proposed removal charged

appellants with the violation of a statute, for which a fine of not more than $1,000 or imprisonment for not more than one year and a day, or both, could be imposed.23/ Appellants were given seven days to respond.

The Board in Martin v. Department of the Treasury, MSPB Docket No. AT075209044 (June 1, 1982), discussed what constitutes "reasonable cause" when invoking 5 U.S.C. Section 7513(b)(1), the so called "crime provision." The Board determined that an investigation in and of itself was insufficient to give rise to "reasonable cause" to invoke the crime provision, but that an investigation or arrest accompanied by other circumstances as would give rise to reasonable cause would be sufficient. Cited as examples of these accompanying circumstances are

arrest coupled with a holding for further legal action by a magistrate; an investigation resulting in evidence supporting reasonable cause; and certain egregious acts detrimental to the accomplishment of the agency's mission, such as murder or national security offenses, brought to the agency's attention via the news media. Martin, id., at 9-10.

Although appellants were not arrested and prosecuted for violating 18 U.S.C. Section 1918, I hereby take official notice of the fact that various air traffic controllers, who were similarly situated to appellants, were. Therefore, I find that the fact that appell4nts were not arrested is irrelevant to the determination of whether there was "reasonable cause" to

believe they had violated 18 U.S.C. Section 1918. I further find that appellants' act of striking against the Government in violation of the law and of their oath of office was an egregious act detrimental to the accomplishment of the agency's mission and that the seriousness of the offense properly gave rise to a reasonable cause to believe that appellants had committed a crime. Thus, I find that the agency had reasonable cause to invoke 5 U.S.C. Section 7513(b) allowing for the abbreviated notice period. Schapansky, supra, at 8.

Having found that the agency properly invoked 5 U.S.C. Section 7513(b), I must determine whether the amount of time allowed for appellants' replies was reasonable.

Title 5 U.S.C. Section 7513(b)(2)

requires a reasonable time but not less than 7 days be afforded for a response. Thus, any lesser amount of time would be error. The Board held in Land v. Federal Aviation Administration, MSPB Docket No. CH07528110154 (July 21, 1982), that when an employee is given at least 7 days but still challenges the time period as unreasonable, the underlying circumstances must be examined to determine the reasonableness of the time period actually provided, as the courts did prior to the passage of the Civil Service Reform Act.24/

Appellants argue on appeal that seven days was an insufficient amount of time within which to reply and that it was unreasonable for the agency to deny the requests made shortly after the issuance of the proposal notice, for

extensions of time.

In examining the record I note that no attempt was made by the majority of appellants to schedule an oral reply; that the material relied upon was readily available at the facility; that the charges were simple and easy to comprehend; and that no emergency or unforeseen exigency arose which would warrant an extension of time. Moreover, appellants have had an opportunity to sjbmit in support of their appeals any and all evidence or argument that they would have submitted to the agency. They have failed to make even a minimal showing of how they were prejudiced by the agency's denial of their requests for an extension. Johnson v. Department of the Treasury, supra. Therefore, I find that appellants were afforded a

reasonable time to respond.

c. Non-duty/non-pay Status.

Appellants correctly assert that those of them who missed their deadline shift and were terminated, were maintained in a non-duty non-pay status during the entire notice period until their removals became effective. Appellants argue that the FAA's action in placing them in a non-pay status was a constructive suspension imposed without notice or any of the procedural protections for adverse actions found in 5 U.S.C. Section 7513. They further argue that where, as here, the "crime exception" was involved, that the agency could have placed them in a non-duty status for a period not to exceed 10 days, but even under these circumstances, they were entitled to pay for the period.

5 C.F.R. Section 752.404(d)(1).25/

The evidence of record clearly establishes that appellants were in a non-pay status from the moment they missed their respective deadline shifts. Both facility chiefs testified that this was done because of the AWOL status of the absent controllers, which is by definition a non-duty and non-pay status. Appellants argue that because the agency has admitted that none of them would have been allowed to return to work during this period, it was improper to consider them AWOL.

The Board has indicated that whether the placing of an employee in a non-pay status is tantamount to a constructive suspension must be analyzed under a three part test:

(1) were appellants carried in a

non-pay status without their consent?

(2) were appellants ready, willing, and able to work during the period on non-pay status?

(3) was the non-pay status used in a personal, disciplinary situation as to each appellant?

Mosley v. Department of the Navy, 4 MSPB 220 (1980). It is undisputed that all appellants were carried in a non-pay status without their consent and that they were kept in this status for disciplinary reasons. The question then becomes whether the appellants were ready, willing and able to work. See, Varner v. Department of the Navy, MSPB Docket No. SE07528010018 (February 11, 1981) and Bauer v. Department of the Treasury, MSPB Docket No. SF07528110007 (August 12, 1982).

The documentary evidence and the testimony shows that none of the appellants in this case gave an oral reply. Almost 99 percent of the appellants testified that they believed that they had been fired on the morning of August 5, 1981, on national television by Drew Lewis. There is absolutely no evidence that any of the appellants in this case attempted to return to work after they voluntarily absented themselves on the specific dates indicated below. Accordingly, I find that none of the appellants have shown by preponderant evidence that they were ready, willing, and able to work.

Consequently, their absences from work during the notice period was not against their will since they made no credible effort to return to work. Here

again, a simple phone call to their supervisor would have sufficed. I conclude, therefore, that the agency's placement of these individuals in a non-pay status during the notice period did not amount to a suspension.

I further note that appellants were treated no differently than any other appellant who voluntarily absents himself or herself from duty and is then removed before he or she returns to duty. An employee whose removal is proposed is entitled to pay during the notice period, regardless of the charges. This is true even if the charge is AWOL. But pay during the notice period of removal proposed for AWOL, presupposes that the employee has returned to duty. An employee who is AWOL and never returns is entitled to no pay commencing with the

first minute of AWOL. 5 C.F.R. Section 752.404(d)(1) is clearly intended to apply to the situation where an agency does not want on its premises an employee who is otherwise ready, willing and able to work.

Efficiency of the Service

In their brief, the appellants argue that the agency's removal actions do not promote the efficiency of the service, that the penalty of removal was unreasonable.

With regard to the issue of nexus, I find that there is a rational relationship between the sustained charges and the efficiency of the service. Striking against the government obviously impairs the efficiency of the service for the same reasons that unauthorized absence does.

Unauthorized absence from duty has been held to be proper grounds for some disciplinary action since by its very nature it disrupts the efficiency of the service. Desiderio v. Department of the Navy, 4 MSPB 171 (1980). In fact, courts have held that removal is an appropriate penalty for this offense.26/ Therefore, I find that some disciplinary action is warranted in appellant's case.

The purpose of Board review of the penalty selected is "to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness." Douglas, supra, at 28. When the Board does find that a penalty is excessive, the corrected penalty to be specified by the Board is not the penalty which the Board itself would find to be reasonable, but instead is the

maximum penalty that would be "within the parameters of reasonableness." Davis v. Department of the Treasury, MSPB Docket No. NY075209075 (October 2, 1981).

The reasonableness of the penalty here must be evaluated in view of the statute violated by appellant. 5 U.S.C. Section 7311 states in pertinent part:

> An individual may not accept or hold a position in the Government of the United States or the Government of the District of Columbia if he -
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or of the Government of the District of Columbia...

Thus, the plain language of the statute prohibits a person who participates in a strike against the

Federal Government from holding a position in the government. Although the statute does not specifically mandate the removal of a Federal employee who participates in a strike against the Federal Government, removal is obviously the only penalty which can produce the required result.27/ The statutory language by itself is sufficient to persuade me that removal is a reasonable penalty for participating in a strike against the government. However, I observed that an agency may not impose and the Board may not approve lesser penalties than those prescribed by statute. In reviewing a case involving violation of 31 U.S.C. Section 63a(c)(2) misuse of a Government vechicle), the Board noted that the agency could not properly impose a lesser penalty than

that provided by the statute. Woody v. General Service Administration, MSPB Docket No. SF07528110028 (June 2, 1981). In a settled case, the Board refused to approve an agreement reached by the parties because the settlement contemplated a penalty less than that required by statute. Special Counsel v. Dukes, MSPB Docket No. HQ120600020 (October 29, 1981).

The Ninth Circuit Court of Appeals has taken a similar position. In American Postal Workers Union v. United States PostalService, 682 F.2d 1280 (1982), the court addressedthe question of whether an arbitrator's decision requiring the postal service to reinstate an employee who had been removed for striking was illegal. The court evaluated the facts of the case

and concluded his reinstatement would violate 5 U.S.C. Section 7311. Thus, the Ninth Circuit has interpreted the statute to require the appellant's removal. In fact, the court stated very clearly that "The choice of sanctions...is not arbitrable; that choice has already been made by Congress." Id. at 7.

Although the text of the statute can be read to require removal as the mandatory penalty for federal employees against whom charges of striking are sustained, thereby foreclosing any mitigation of the penalty, I find only that under the circumstances of this case, the penalty of removal is reasonable and that no satisfactory basis for mitigation exists. See Schapansky, supra.

[t]he position of air traffic

controller is a highly sensitive one because the incumbent is directly responsible for the safety of airline passengers and must preserve the confidence of the employer and the public who rely on him. A controller's intentional and ongoing abdication of that responsibility in order to participate in the strike and his decision to (strike)...despite the President's 48 hour grace period thus constitue particularly egregious conduct which destroys the controller's unique relationship of trust with his employer.

Finally, the Board found that removal for strike participation promotes the efficiency of the service because there is a clear relationship between such misconduct and the employee's

ability to perform hisjob and the agency's ability to carry out its work. Based on Schapansky, I find that appellants' removal for striking promotes the efficiency of the service and is a reasonable penalty in this case.

Disparate Treatment.

Appellants argue that the agency's implementation of the deadline allowing controllers until their first shift on or after 8:00 a.m. PDT on August 5, 1981, to return to work resulted in arbitrary enforcement of 5 U.S.C. Section 7311 or disparate treatment: those who complied with the deadline were not disciplined, and no inquiry was made by the agency to determine whether or not they had been on strike; those who failed to comply with the deadline wpre removed. Thus, according to appellant, the discipline

for striking was unevenly applied.

The established evidence upon which appellants base their argument is as follows: As implemented, the deadline meant that those individuals who reported for their deadline shifts on or after August 5, 1981 were not disciplined, and no determination was made about their strike participation, regardless of their conduct on August 3 and 4, 1981. In all but rare cases, controllers who failed to report for their deadline shifts were removed. Some of the sprinters were absent from work on August 3 and 4, 1981, and some of them picketed on those days. The agency was aware of this conduct. Some of the controllers who failed to meet the deadline were sent notices of proposed removal shortly after the commencement of their missed deadline

shifts. Some of the controllers, who missed their deadline shifts, were removed although there is no ev.dence that they participated in picketing. Appellants were charged with being on strike and being AWOL, not with missing their deadline shifts.

I do not find persuasive appellants' argument that the deadline's implementation resulted in impermissible disparate treatment. If, as discussed above, the penalty of removal is a mandatory, statutory penalty, the Board has held that such a penalty must be imposed even if the agency failed in other cases to comply with the statute. Woody v. General Services Administration, MSPB Docket No. SF07528110028 (June 2, 1981).

Assuming, as discussed above, that

the penalty of removal is merely reasonable, regardless of any mitigating factors, I also find thatthe claim of disparate treatment in connection with the deadline cannot be sustained. The agency could reasonably have removed all strike participants, including those who participated only on August 3 and 4. Pursuant to the implementation of the deadline, it did not do so. The President's grace period and the agency's implementation of the deadline, gave all controllers, regardless of their schedules, at least 48 hours to think about the consequences of strike participation and to consider that failure to report at the end of the grace period would mean termination. The purpose of the grace period was clearly to allow the crisis caused by the strike

which began on August 3, to be speedily resolved. It meant that the agency knew, for most controllers, in the few days following August 5, which controllers it could count on to work as employees and which controllers it would begin to remove. I find that the implementation of the deadline was a benefit to controllers which the agency or the President was not required to provide.

The agency's action in giving controllers at least 48 hours to decide how to proceed cannot now be used to establish a claim of disparate treatment on behalf of controllers who have been found to have been on strike after the deadline passed. All controllers were similarly situated in regard to the deadline, all were afforded its benefits. The agency's determination that striking

after the deadline warranted removal was applied equally to all controllers. The agency apparently determined that the harm caused by failure to meet the deadline, prolongation of the crisis caused by the strike, was sufficient, serious harm, so that removal was warranted. I find that use of the deadline was proper.

Illegal Entrapment Defense

Finally, appellants allege that since some of their non-union supervisors encouraged them to participate in the strike, that such encouragement constituted inducement by the agency and is tantamount to entrapment by the agency. I find this argument wholly specious for the following reasons:

First, entrapment is a defense to a criminal prosecution. The defense is a

recognition of a basically equitable principle that after government officials implant in the mind of an innocent person the disposition or desire to committee an offense and induce its commission, the government cannot prosecute the accused. Johnson v. National Broadcasting Co., Inc., 356 F. Supp. 904 (D.C.N.Y. 1973).

Notwithstanding the fact that they were charged with a crime, the appellants in this case are not being prosecuted for a criminal offense. The present action before this Board was at appellant's request and is entirely administrative in nature. The criminal defense of entrapment does not apply to administrative proceeding before the Board.

Second, even assuming that the defense did apply, appellants could not,

on the facts of this case, successfully establish a defense based on entrapment.

Judge Learned Hand's discussion of the defense of entrapment in United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952), provides an appropriate starting point for analyzing the merits of an entrapment defense:

"[I]n such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged... (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden, on the second the prosecution has it."

Accordingly, in order for appellants to prevail on an entrapment defense they would have the burden of

proving that the government induced them into participating in the strike. However, all of the evidence on this issue demonstrates that PATCO both nationally and locally planned, initiated and orchestrated the strike. The agency, on the other hand, counselled, briefed and tried to dissuade the controllers from participating in the strike. Indeed, the President of the United States, Ronald Reagan, offered amnesty to any controller who would return to work.

Finally, inherent in the defense of entrapment is the fact that the accused actually committed the offense charged. None of the 26 appellants in this case admitted to participating in the illegal strike.

It is well settled that the defense

of entrapment is available only to one who admits the crime charged. United States v. Hendricks, 456 F.2d 167 (9th Cir. 1972), citing, United States v. Rodriguez, 446 F.2d 859 (9th Cir. 1971); Chisum v. United States, 421 F.2d 207 (9th Cir. 1970); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Dunbar v. United States, 212 F.2d 320 (9th Cir. 1954). In short, an (appellant) is not entitled to the defense of entrapment where he denies that he committed the offense charged. United States v. Barrio, 457 F.2d 680 (9th Cir. 1972).

The Las Vegas Air Traffic Control Tower.

The testimony of Mr. Richard Barker, the facility chief, shows that on August 3, 1981, the Las Vegas Air Traffic

Control Tower was authorized staffing for 49 controller positions; of those 47 were filled. Forty-one of the positions were for journeyman controllers and six were allotted to developmental or trainee controllers. On the day shift for August 3, fourteen controllers were scheduled for duty and only one reported to work.

According to the testimony of Mr. Barker, all of the controllers whose cases are discussed below had assigned shifts at some point during the first three weeks of August 1981 and did not report when scheduled or when specifically directed to report by him. Mr. Barker testified and the record evidence shows that all of the appellants were advised prior to August 3, 1981, that participation in a strike against

the government was illegal. The witness testified that he removed all of the appellants because he concluded that they were participating in the strike based on their unauthorized absence from work and their failure to return to work within their amnesty deadlines.

At the individual hearings for this facility, the agency relied on time and attendance records for each appellant including watch schedules which show that they were absent without authorization on the dates specified below.

Based on the above evidence and my previous finding regarding the duration of the strike, I find that the agency has established a prima facie case that all of the 26 appellants at the Las Vegas facilities voluntarily participated in an illegal strike on the dates specified

below. Schapansky, supra.

1. Specific Evidence and Arguments Presented in the Case of Arthur Amador

The record evidence and testimony shows that Mr. Amador was scheduled to report for work on August 3, 5 and 6, 1981 and did not report. The 7:00 p.m. shift on August 6, was appellant's amnesty deadline shift.

By letter dated August 11, 1981, appellant was served with a Notice of Proposed Removal for participating in a strike and being absent without official leave.

Appellant did not make an oral reply to the charges and his written reply did not explain his absences.

Appellant was removed from his position as an Air Traffic Control

Specialist GS-2152-13 for the above reasons effective August 29, 1981.

In addition to the time and attendance records, the agency also presented the testimony of Richard Barker, the facility chief. Mr. Barker testified that he observed appellant picketing on August 5, 1981. According to Mr. Barker, he approached appellant on the picket line and ordered him to report for work at 2:00 p.m. that same day. (Agency Ex. A).

In response to the evidence presented by the agency, the appellant admitted that he was absent from work on August 3 and 6, two days that he was scheduled to work. Additionally, appellant admitted that he did not work on those dates because he was participating in a "job action" against

his employer.

Although appellant referred to his refusal to report for work on August 3 and 6 as his participation in a "job action", this Board has already found that appellant's "job action" constituted an illegal strike against the government. Furthermore, the placard which appellant was wearing while picketing clearly read "PATCO On Strike".

After reviewing the evidence presented, I find that appellant has not rebutted the agency's prima facie case that he voluntarily participated in the strike on August 3 and 6.

In reaching this decision, I am persuaded by and have relied on the following evidence: (1) the fact that appellant was scheduled for and absent from duty on August 3 and 6; (2) the

fact that the above absences occurred during a period which I haze found that the strike was in progress; (3) the fact that after approximately 18 months, appellant has failed to offer any excuse or explanation for his absences; and, (4) appellant's admission that he participated in the "job action" which I have found was an illegal strike.

Accordingly, I find that the agency has proved by a preponderance of the evidence that the appellant voluntarily participated in the strike on August 3 and 6. For the above reasons, the strike participation charge against this appellant is sustained.

(MATERIAL RELATED EXCLUSIVELY TO OTHER APPELLANTS APPEARING AT THIS POINT IS HEREWITH DELETED.)

The AWOL Charges

The second charge is that the appellants were AWOL for dates specified in their proposal notices. Following the same analysis used in the strike participation charge, I find that this charge must be limited to the same dates that the appellants were found to have participated in the strike, since I have already found that the appellants voluntarily withheld their services on the dates specified in their individual sections and did not present legitimate excuses for their absences on those dates, I find that a preponderance of the evidence supports the charges that they were AWOL on those dates.

Finally, appellants argue that because the agency's witnesses testified on numerous occasions throughout these

hearings and they only testified once, I should not penalize them for their demeanor. In evaluating the testimony of those appellants who testified I have weighed their testimony against the established evidence of record. In this regard, appellants' testimony has been reviewed with regard to its consistency with all the evidence of record.

It has been held that credibility is based upon the rationality and consistency of the testimony of the witnesses and on the manner in which the testimony supports or detracts from other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). Further, a proper determination of credibility should take into account all of the evidence relevant to a witness' testimony and the cumulative impact of

the testimony. Altamose Construction Company v. N.L.R.B., 514 F.2d 816 (3rd Cir. 1975). Credibility has been termed the quality or power of inspiring belief. Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be "credible" in itself, by which it is meant that it shall be natural, reasonable, and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it. Credible testimony is that which meets the test of plausibility. Indiana Metal Products v. N.L.R.B., 442 F.2d 46 (9th Cir. 1971).

All of the appellants testified that they were not on strike even though they admit to picketing in front of the facility wearing a large placard which read PATCO Air Traffic Controllers on

Strike. Similarly, all of the appellants testified that they believed that they had been fired by either Drew Lewis or President Reagan on August 5, at 8:00 a.m., even though many were personally ordered to report for work by their facility chief.

Because of the inconsistency of appellants testimony and their demeanor, I do not find that their testimony meets the test of plausibility in light of the established facts.

I also find that appellants' testimony, as a whole, was less than credible. Weaver v. Department of the Navy, 2 MSPB 297 (1980).

CONCLUSION

In each of these cases the agency's prima facie case of strike participation was not rebutted by the appellants.

Through their counsel, appellants have advanced numerous arguments, the majority of which are unsubstantiated and directly contradicted by the overwhelming evidence that the appellants in this case, along with approximately 12,000 of their co-workers, voluntarily and defiantly walked off their jobs in an effort to gain through a clearly illegal act additional benefits from their employer.

Since I have found that the removal actions are supported by a preponderance of the evidence, that they promote the efficiency of the service, and that the appellants have not proved harmful error by the agency, the actions removing all of the appellants are sustained.

DECISION

The agency's decision to removal all 26 appellants is AFFIRMED.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 24, 1983 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont

Avenue, N.W., Washington, D.C. 20419. An information copy of the petition should be filed with the presiding official at the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he is of the opinion that the decision is erroneous and will have substantial impact on any

civil service law, rule, or regulation under the jurisdiction of the office. 5 U.S.C. Section 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(b)(1)*/ the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review mustbe filed with the United States Court of Appeals for the Federal Circuit not later than 30 days after appellant's receipt of the Board's final order of decision.

FOR THE BOARD:

s/F. Lamont Liggett
Presiding Official
F. Lamont Liggett

FOOTNOTES

1/ By Board Order dated July 28, 1981, the appeals included in this case were consolidated for hearing and further processing.

2/ In Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713, at 4-5, 9 (May 28, 1982) the Board found that official notice could be taken that a strike by Air Traffic Controllers occurred August 3 through 6, 1981. Further, the Board found that the strike was unlawful under 5 U.S.C. Section 7311 and 18 U.S.C. Section 1918. On June 4, 1982 the San Francisco Regional Office of the Board too§ official notice that an illegal strike commenced on August 3, 1981 and continued at least through August 6, 1981, subject to refutation.

3/ This statement and the 48 hour time period were subsequently referred to as the "Rose Garden Speech" 4nd the "amnesty period". I will refer to it as the President's Amnesty period. See Air Traffic Controllers Strike, 17 Weekly Comp. Pres. Doc. 845 (August 3, 1981).

4/ Approximately 1,236 controllers ultimately returned to work within the deadline as implemented by the FAA. See, Professional Air Traffic Controllers Organization v. Department of Transportation, 529 F. Supp. 614, 615 (D. Minn. 1981).

5/ The term "GENOT" refers to a general notice transmitting information from FAA Headquarters in Washington, D.C. to its field offices.

6/ Most of the standard letters prepared by the union requested an extension of

time to reply, information regarding the definition of "strike participation" and request for additional information under the Freedom of Information Act (FOIA).

7/ Section 7 of the National Labor Relations Act, 49 Stat. 449, 452 (1935) guarantees private sector employees the right to engage in concerted activities, -- strikes -- for the purpose of collective bargaining.

8/ Title 18 of the United States Code, Section 1918, provides, in pertinent part, the following:

1918. Disloyalty and asserting the right to strike against the Government.

Whoever violates the provision of Section 7311 of title 5 that an individual may not accept or hold a position in the Government of the

United States or the government of the District of Columbia if he -

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

9/ Conversely, the fact that two employees withhold their services from their employer at precisely the same time, even for the same reasons, does not necessarily mean that are acting "in concert" unless there is an agreement or understanding. Cf. Tri-State Truck Service, Inc. v. NLRB, 616 F.2d 65, 71 (3rd Cir. 1980).

10/ In criminal law the most common

usage of "specific intent" is to designate a special mental element which is required above and beyond the mens rea required with respect to the actus reas of the crime. "General intent" on the other hand, is simply the intent to do that which the law prohibits. See, R. Perkins, Perkins on Criminal Law, 2d ed. 1969, p. 762.

11/ In United States v. Professional Air Traffic Controllers Organization, 524 F. Supp. 160 (D.D.C. 1981) the court refused to find that PATCO and its President, Robert Poli, were in violation of an injunction against striking after 8:00 a.m. on August 6 even though they continued to advocate a strike because, as a practical matter, very few employees could have returned to work after that time. The court held that due process

did not allow continued enforcement of injunctive relief where the employer had made it impossible to comply with the terms of the injunction.

10/ (12/) See, e.g., United States v. Amato, 534 F. Supp. 1190 (E.D. NY 1982), wherein the court found that statements made by the Attorney General to the FAA Administration were merely policy statements and would not be enforced unless compliance was mandated by law of the Constitution. In addition, the Court in United States v. PATCO, 524 F. Supp. 164 (D.D.C. 1981) found that notwithstanding the statements of President Reagan and Secretary Lewis, the strike continued beyond August 5 because of the ability of strikers to return to duty beyond that date.

13/ The latter argument completely

mischaracterizes the evidence, which shows that a controller would not have been allowed to report for work but not that the controller had already been fired. The issuance of a notice of proposed removal was preliminary to the actual "firing" of appellants, not tantamount to it.

13/ The Board held in Giesler v. Department of Transportation, 3 MSPB 367 (1980), that it will treat provisions of a collective bargaining agreement in the same manner as it does provisions of an agency's regulations and will enforce employee rights derived from such a negotiated agreement. Thus, the PATCO contract is controlling here since there is no evidence that it was no longer in effect for the dates relevant to this proceeding, notwithstanding the FAA's

argument to the contrary.

14/ 49 Stat. 1162 (1936).

15/ The Annual and Sick Leave Act of 1951, 65 Stat. 679 (1951).

16/ The current statute was enacted on September 6, 1966 when Congress enacted 5 U.S.C., 80 Stat. 520.

17/ E.g., Hunger v. Department of the Interior, 2 MSPB 274 (1980) (Harmful error analysis applied to claim of 5 U.S.C. Section 7513(b) violation that agency failed to afford employee advance notice of charge); Graham v. U.S. Postal Service, 22 MSPB 377, 380, 381 (1980) (Harmful error analysis applied to claim of 5 U.S.C. Section 7513(b)(2) and Section 7513(e) violation that agency failed to consider written reply and failed to provide Board with accurate and complete summary of such reply); Cade v.

U.S. Postal Service, MSPB Docket No. SF07528010370 at 2, n. 1 (November 24, 1981) (Harmful error analysis applied to 5 U.S.C. Section 7513(b)(1) claim that agency provided 26 rather than 30 days advance notice); Messersmith v. General Service Administration, MSPB Docket No. DC07528010253 at 3-4 (December 2, 1981) (Harmful error analysis applied to claim of 5 U.S.C. Section 7513(b)(2) violation that agency denied appellant an opportunity to make an oral reply); Echols v. Defense Logistics Agency, MSPB Docket No. AT0752810263 at 2 (May 11, 1982) (without citing the statute, harmful error analysis applied to claim that written reply not considered); and Swindell v. Veterans Administration, MSPB Docket No. NY07528110119 at 3-4 (June 14, 1982) (Harmful error analysis

applied to oral reply violation).

18/ Remarks of Senator Percy, Illinois, co-sponsor of S. 2640, 124 Cong. Rec. S. 2777 (daily ed. March 3, 1978).

19/ "One of the major purposes of H.R. 11280 is to make it easier to remove employees for misconduct, inefficiency, and incompetence." Civil Service Reform Act v. Report of the Committee on Post Office and Civil Service on H.R. 11280, House of Representatives July 31, 1978, at 108; Legislative History of the Civil Service Reform Act of 1978 (hereafter Legislative History Vol. No. 1 at 745).

20/ "One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons." Civil Service Reform Act. v.

Report of the Committee on Government Affairs, United States Senate, to accompany S. 2640, July 10, 1978, at 4; Legislative History, Vol. No. 2 at 1468.

21/ E.g. Civil Service Reform Act v. Hearings before the House Committee on Post Office and Civil Service on H.R. 11280, 95th Cong. 2d Sess. 31, 122-123 (1978) (hereafter "House Committee Hearings"); and, Hearings before the Senate Committee on Governmental Affairs on S. 2640, S. 2707 and 2830, 95th Cong., 2d Sess. 22, 43, 101 (1978).

22/ See remarks of Representative Udall responding to an amendment (defeated) providing for a predetermination hearing on the basis that the amendment is "exactly opposite to the main thrust" of H.R. 1120 which is to make it easier to discharge or discipline employees. 124

Cong. Rec. H 9372 (daily ed. September 11, 1978).

23/ 18 U.S.C. Section 1918.

24/ 5 U.S.C. Section 7501(b)(3) (1978) provided only that employees be afforded a "reasonable time" for filing a written answer to the charges.

25/ Section 752.404(d)(1) reads: "When the circumstances require immediate action, the agency may place the employee in a non-duty status with pay for such time, not to exceed ten days as is necessary to effect the action." (Emphasis added)

26/ See Chiaverini v. United States, 157 Ct. Cl. 371 (1962); Rubin v. United States, 150 Ct. Cl. 28 (1960); Chiriaco v. United States, 235 F. Supp. 850 (N.D. Ala. 1963), aff'd 339 F. 2d 588 (5th Cir. 1964).

27/ Since the language of the statute is plain, it controls unless there is "clearly expressed legislative intention to the contrary," Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980), or unless it would lead to "absurd results." Commission v. Brown, 380 U.S. 563, 571 (1965). The legislative history of 5 U.S.C. Section 7311, Public Law 84-330 (1955), and Section 305 of the Taft-Hartley Act, support an inference that Congress intended to require the discharge of persons wo strike against the government. Further Section 7311 is wholly consistent with other laws on this subject (5 U.S.C. Section 3333 and 18 U.S.C. Section 1918), and would not, therefore, lead to absurd results.

*/ As modified by Section 127 of the

deral Courts Improvement Act of 1982 to

codified at 28 U.S.C. Section 1259 (a)

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